No. 87 488

Supreme Court, U.S.
FILED
SEP 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL MARINE SERVICES, INC., *et al.*,

Petitioners,

vs.

SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals has failed to follow the controlling decisions previously rendered by this Court in *Nolde Bros., Inc. v. Local No. 358 Bakery & Confectionery Workers Union,* 430 U.S. 243 (1977), wherein this Court enunciated the principles to be applied in determining whether a party to a collective bargaining agreement may be required to arbitrate a contractual dispute which arises after the termination of the agreement, and in *AT&T Technologies v. Communications Workers of America,* ____ U.S. ____, 106 S.Ct. 1415 (1986), wherein this Court established the scope of a court's duty to interpret the agreement to determine whether the parties intended to arbitrate such dispute, by compelling arbitration herein concerning a sale of assets following expiration of the collective bargaining agreements upon findings only that:

(a) it could not be said with "positive assurance" that the contract clauses at issue are "not susceptible of an interpretation that covers the dispute"; and

(b) it could not be said with "positive assurance" that, at least to some extent, the Union's grievances did not colorably "arise under" the collective bargaining agreement.

2. Whether the Court of Appeals has failed to follow the requirements announced in *AT&T Technologies v. Communications Workers of America,* ____ U.S. ____, 106 S.Ct. 1415 (1986), by its wholesale acceptance of the Union's characterization of the nature of the dispute herein as involving subcontracting and recognition claims without undertaking any meaningful analysis of the substantive provisions of the contract, and

the other forceful evidence presented,[1] in rendering its decision that the dispute herein is subject to arbitration.

3. Whether the Court of Appeals has called into question its obligation to follow this Court's decision in *Nolde Bros. Inc. v. Local 358 Bakery & Confectionery Workers Union,* 430 U.S. 143 (1977), by opining that the broad holding in *Nolde Bros.* is unsupported by any traditional legal contract principles, and whether the Court of Appeals has called into question and totally misapprehended its duty to follow this Court's decision in *AT&T Technologies v. Communications Workers of America,* ____ U.S. ____, 106 S.Ct. 1415 (1986), by stating that *Nolde Bros.* is driven only by a preference for judicial economy and the belief that labor-management disputes relating to terms of collective bargaining agreements should be addressed by the arbitrator in the first instance.

PARTIES TO THE PROCEEDINGS BELOW

The only other parties to the proceedings below not listed in the caption are:

1. Compass Marine Propulsion, Inc.

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[1] *See* Statement Of The Case, *infra.* The United States District Court for the Eastern District of Louisiana expressly found National Marine's sale of assets was designed to raise capital. *See Seafarers International Union v. National Marine Services, Inc.,* 639 F.Supp. 1283, 1285 (E.D. La. 1986). Because the assets sale did not occur until after the expiration of the collective bargaining agreements, the District Court held the Union could advance its post-contract claim only under Section 8(a)(5) of the National Labor Relations Act. 29 U.S.C. Sections 158(a)(5), b(3).

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Petitioners,

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SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, National Marine Services, Inc., (hereinafter "National Marine" or "the Company") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 29, 1987, reversing the District Court's judgment denying the Seafarers International Union's (hereinafter "SIU") motion to compel arbitration of a dispute concerning the sale by National Marine Services, Inc. of its towboat assets and its accompanying lay off of employees following expiration of the collective bargaining agreement between National Marine Services, Inc. and the SIU.

OPINION BELOW

The opinion of the Court of Appeals reversing the decision of the United States District Court for the Eastern District of Louisiana, entered on June 29, 1987, is reported at 821 F.2d 148 (5th Cir. 1987), 125 LRRM 3069.

The Opinion and Order of the United States District Court for the Eastern District of Louisiana, Morey L. Sear, United States District Judge, entered on July 18, 1986, dismissing the Union's complaint, is reported at 639 F.Supp. 1283 (E.D. La. 1986).

The Court of Appeals and District Court opinions appear in the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals, reversing the decision of the United States District Court for the Eastern District of Louisiana, was entered on June 29, 1987. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns the provisions of the Labor Management Relations Act, as Amended, 29 U.S.C. Section 185(a), and the National Labor Relations Act, as Amended, 29 U.S.C. Sections 157 and 158. For the Court's convenience, these sections are set forth in the Appendix to this Petition.

STATEMENT OF THE CASE

National Marine Services, Inc. has been engaged in the barge transportation business, primarily the transport of chemicals and liquid petroleum products, since the late 1920's. Since 1961, National Marine has been signatory to successive bargaining agreements with the SIU, the most recent of which was effective from October 9, 1982 through October 8, 1985 for licens-

ed and unlicensed personnel operating the Company's towboats and performing other ancillary services.

Compass Marine Propulsion, Inc. (hereinafter "Compass") also has been engaged in the barge transportation business for many years but, unlike National Marine Services, Inc., Compass engages only in the towing business and it owns no barges. In October 1985 Compass employed approximately 95 employees.

Severe economic problems have plagued the entire marine industry since the late 1970's and, by 1985, National Marine Services, Inc. was unable to operate its own towboats at rates competitive with current market rates.[2] Accordingly, in an effort to improve its economic and competitive posture, changes were implemented in mid-1985, including consolidation and relocation of facilities and staff reductions.

While labor costs had not caused National Marine's financial difficulty, the Company did engage in decisional bargaining with SIU prior to the expiration of the then-current collective bargaining agreements in order to develop possible alternatives to the proposed sale of the towboats. During these negotiations, National Marine informed the SIU it was considering the sale in order to improve its cash flow and to permit transport of its barges at market rate. The SIU was informed, if the proposed sale occurred, permanent lay off of all bargaining unit employees would follow. The SIU did not propose any alternatives.

Thereafter, in late September 1985, National Marine entered into an agreement with Compass Marine whereby Compass agreed to purchase 14 of National Marine's towboats for $5,275,000, effective October 9, 1985. National Marine and

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[2] It cost National Marine Services, Inc. approximately $5,000.00 more per day than market rate to operate its own vessels.

Compass later entered into a separate towage agreement whereby Compass agreed to give National Marine priority use of the towboats to move its barges. However, in the event a towboat is laid up, Compass is free to engage the vessel in other work.

By letter dated September 26, 1985, National Marine informed SIU of its intent to sell its fleet to Compass on October 9, 1985. This letter also informed SIU all bargaining unit employees would be permanently laid off upon expiration of the current collective bargaining agreements. The Company also offered to bargain over the effects of this decision on bargaining unit personnel.

On September 27, 1985, SIU filed a grievance on behalf of the unlicensed personnel alleging the Company had violated the subcontracting clause and the recognition clause of the unlicensed contract. By letter dated October 2, 1985, National Marine denied the grievance, *inter alia,* on the grounds it lacked procedural and substantive arbitrability.

On October 4, 1985, SIU requested arbitration of its September 27 grievance and, in response, the Company again informed the SIU the grievance lacked procedural and substantive arbitrability and that the Company would not submit the grievance to arbitration.

On October 7, 1985, two days before the effective date of the sale to Compass, SIU filed the present action for temporary restraining order, preliminary injunction and permanent injunction seeking (1) an order compelling National Marine to submit the September 27 grievance to arbitration and (2) an injunctive order prohibiting National Marine and Compass from consummating the sale of the towboats and prohibiting National Marine from laying off bargaining unit employees, pending arbitration of the September 27 grievance.

On October 8, 1985, following hearing, the District Court denied SIU's request for a temporary restraining order.

Thereafter, on October 30, 1985, the District Court held a hearing to consider SIU's request for an order compelling National Marine to arbitrate the September 27 grievance.

By order dated March 31, 1986, the District Court dismissed SIU's request for injunctive relief, and in its written opinion dated July 18, 1986, the District Court held SIU's grievance did not involve contractual rights under the collective bargaining agreement, but rather involved statutory rights under the National Labor Relations Act, Sections 7 and 8, as Amended, 29 U.S.C. Sections 157, 158. The District Court concluded the proper forum for adjudication of those statutory rights was the National Labor Relations Board, not the Federal District Court.[3]

The SIU appealed from the District Court's order denying preliminary injunctive relief against the sale of the towboats and the permanent lay off of bargaining unit members and the order denying the motion to compel arbitration. The Fifth Circuit held, *inter alia,*[4] its reading of *Nolde Bros., Inc. v. Local No. 358 Bakery & Confectionery Workers Union,* 430 U.S. 243 (1977), required reversal because the decision in *Nolde* must be read as broadly holding the expiration of a collective bargaining agreement does not extinguish the duty to arbitrate disputes under the agreement. The Court expressly rejected National Marine's contention that the *Nolde* decision applies only to rights that accrue under the collective bargaining agreement.

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[3] While the injunction case was pending, the SIU did file an unfair labor practice charge with the NLRB in New Orleans, claiming National Marine and Compass had violated Section 8(a)(3) by discharging the bargaining unit employees in order to avoid their collective bargaining obligations. The SIU also charged National Marine and Compass were alter egos and that the companies had collectively violated the subcontracting and recognition clauses of the collective bargaining agreement, all in violation of Section 8(a)(5) of the Act. Following investigation, the Board found the SIU's charge to be without merit and the SIU withdrew the charge.

The Court further held SIU's grievances are arbitrable under *AT&T Technologies v. Communications Workers of America,* ____ U.S. ____, 106 S.Ct. 1415 (1986), because it could not be said with "positive assurance" that the relevant clauses of the collective bargaining agreement - as alleged by the SIU - are "not susceptible of an interpretation that covers the dispute" between National Marine and SIU.

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[4] The Appellate Court dismissed SIU's appeal from the denial of its motion for a preliminary injunction pursuant to the mootness doctrine.

REASONS FOR GRANTING THE WRIT

The Court Of Appeals Has Failed To Follow The Contract Principles Previously Enunciated By This Court Which Must Be Applied To Determine Whether A Party To A Collective Bargaining Agreement May Be Required To Arbitrate A Dispute Which Arises After The Termination Of The Agreement.

This case involves crucially important questions concerning the obligation of the federal courts to determine the issue of arbitrability in the first instance by applying traditional legal principles of contract, as previously enunciated by this Court, to determine whether a party to a collective bargaining agreement may be required to arbitrate a dispute which arises after the termination of the agreement. There presently exists considerable uncertainty in this area,[5] as is evidenced by the Court of Appeals' broad reading of this Court's controlling precedent in *Nolde Bros.* and its failure to undertake any analysis concerning the relevant clauses of the collective bargaining agreement to properly determine arbitrability, as is required by *AT&T Technologies, Inc. v. Communications Workers of America.*[6]

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[5] The Court of Appeals in the instant case acknowledged the uncertainty with surrounds the proper interpretation of *Nolde Bros.* The Court recognized the District Court's reading of *Nolde Bros.* reflected "intelligence and fairness coupled with an understanding of the principles of contract law and arbitration." *See Seafarers International Union v. National Marine Services, Inc.*, 821 F.2d 148, 152 (5th Cir. 1987). Nevertheless, the Court could not "square" the District Court's decision with its own understanding of *Nolde Bros.*

[6] This Court granted certiorari in *AT&T Technologies* because the Seventh Circuit had read *Nolde Bros.* as "reopening" the issue of a court's duty to decide arbitrability as discussed in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).

Without expressly discussing *Nolde Bros.*, this Court's decision in *AT&T Technologies* can leave no doubt that it is the court's duty in the first instance to interpret the agreement and to determine whether the parties intended to arbitrate a particular grievance.

In large measure this uncertainty has been caused because the appellate courts have been reluctant to undertake any analysis of the terms of an agreement in an overly-guarded effort to assiduously avoid ruling upon the potential merits of the underlying claims. It is respectfully urged that the Supreme Court grant certiorari and review the circumstances of this case as well as the Courts of Appeals differing interpretations of this Court's controlling precedents,[7] so that this Court can provide the guidance necessary to the courts of appeals to undertake meaningful analysis of collective bargaining agreements and to resolve questions that are of great importance to large numbers of employers and unions concerning their obligations to arbitrate disputes, particularly those which follow contract expiration.

(1)

In *Nolde Bros., Inc. v. Local No. 358 Bakery & Confectionery Workers Union,* 430 U.S. 243 (1977), this Court addressed the issue whether a party to a collective bargaining agreement may be required to arbitrate a contractual dispute over severance pay, even though the dispute, while governed by contract, arose after its termination. The Fourth Circuit had framed the question for resolution to be whether the company's duty to arbitrate the claim survived the contract's termination and concluded the parties' arbitration duties survived termination with respect to claims arising by reason of the collective bargaining agreement. This Court granted certiorari to review the Circuit's determination that the severance pay claim was arbitrable.

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[7] *See* discussion *infra* of the extreme divergence of opinion among the Circuits concerning the scope of this Court's decision in *Nolde Bros.* While the Fifth Circuit believes *Nolde* must be read broadly, the Eighth Circuit in *Teamsters Local 238 v. C.R.S.T., Inc.*, 795 F.2d 1400 (8th Cir. en banc 1986), has expressed the view that the *Nolde Bros.* holding is narrow *and* that *all* courts appear to agree that post-contract arbitrability under *Nolde* is dependent upon the vesting or accrual of the rights while the contract was still in effect. The Fifth Circuit has expressly rejected this view of *Nolde Bros.* in the instant case.

Relying upon the decision in *John Wiley & Sons v. Livingston,* 376 U.S. 543 (1964), this Court instructed that even though the parties' arguments demonstrated the severance pay dispute hinged on differing interpretations of that provision of the expired agreement, there is "no reason why parties could not if they so chose agree to the *accrual* of rights *during the term* of an agreement and *their realization after* the agreement had expired." *Nolde Bros.,* 430 U.S. at 249, *quoting John Wiley & Sons v. Livingston,* 376 U.S. at 555. (Emphasis added). This Court acknowledged that the merits of the severance pay claim were not before it but that the resolution of the merits of the claim hinged upon the interpretation ultimately given the severance pay claim and, therefore, the dispute although arising *after* the expiration of the collective bargaining contract clearly *arises under* that contract.

Most importantly, this Court held in *Nolde Bros.* that the parties' obligations *under the arbitration clause* survived contract termination when the dispute was over an obligation *arguably created* by the expired agreement. Again relying upon *John Wiley & Sons,* this Court declined to rule that the question of survival of the obligation to arbitrate depended upon a showing that the union attempted to arbitrate such claims while the agreement was still in effect.

This Court's decision in *Nolde Bros.* requires a two-pronged analysis by the federal courts when a suit to compel arbitration is instituted following expiration of the collective bargaining agreement:

(1) The federal court must determine whether the subject matter of the particular grievance is arbitrable, and, if so,

(2) whether the disputed obligation, arguably created by the expired agreement, survives the termination of the agreement under the arbitration clause.

(2)

In its recent decision in *AT&T Technologies v. Communications Workers of America,* ____ U.S. ____, 106 S.Ct. 1415 (1986), this Court clarified the *Nolde Bros.* and *John Wiley & Sons* holdings by instructing and reaffirming it is the *court's* duty to *interpret* the agreement and to determine whether the parties *intended* to arbitrate the grievances asserted. In *AT&T Technologies,* the union contended the scheduled lay offs would violate Article 20 of the collectively bargained agreement whereas the company asserted its decision to lay off workers was premised upon the management rights clause of the agreement and, therefore, was not subject to the arbitration clause.

The district court had determined the union's interpretation of Article 20 was at least "arguable" and, accordingly, ordered arbitration, and the Seventh Circuit affirmed. This Court held, however, it was for the court, not the arbitrator, to decide in the first instance whether the dispute was to be resolved through arbitration and, particularly, to determine whether, because of express exclusion or other forceful evidence, the dispute over the interpretation of Article 20 is not subject to the arbitration clause.

In his concurring opinion in *AT&T Technologies,* Justice Brennan explained the Seventh Circuit had misunderstood the rules of contract construction and had undertaken an analysis expressly disapproved in *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); that is, the appellate court had read the management rights clause to make arbitrability depend upon the merits of the parties' dispute. Justice Brennan instructed the judicial inquiry required is much simpler. Because the parties' dispute concerns whether the lay off provision of the contract limits management's authority to order lay offs, the question for the court is "strictly confined" to whether the parties agreed to submit disputes over the meaning of Article 20 to arbitration. The court must look to the arbitration clause and

other forceful evidence presented to determine the parties' intent.

AT&T Technologies reaffirms and clarifies the nature of the contract interpretation which must be undertaken by the federal court in the first instance to determine whether the parties intended to arbitrate the grievance asserted. While the Fifth Circuit in the instant case recognizes its obligation to determine whether the grievances asserted are arbitrable, the Court does not expressly address the question but instead states only:

> "Having examined the relevant clauses of the collective bargaining agreement, we cannot say with 'positive assurance' that they are 'not susceptible of an interpretation that covers the dispute' between National Marine and SIU." 821 F.2d at 154.

The Fifth Circuit has failed completely in the first instance to interpret the SIU - National Marine Agreement to determine whether the parties intended to arbitrate the grievances asserted. The Fifth Circuit has failed in this case - as the lower courts had failed in *AT&T Technologies* - to interpret the contract because of its belief that reference to the agreement depended upon the merits of the dispute. Moreover, the Fifth Circuit has utterly failed to consider the forceful evidence presented by National Marine on the question whether the parties' intent to arbitrate extends to the asserted dispute.

Under Justice Brennan's formulation in *AT&T Technologies,* the Fifth Circuit was required to decide, because the nature of the dispute is whether the subcontracting and recognition clauses of the contract limit the company's right to sell assets after expiration of the agreement, whether the parties agreed to submit such dispute to arbitration. The Court of Appeals failed to consider National Marine's forceful evidence that this dispute does not "arise under" the agreement, and that the parties did not intend for this dispute to be arbitrable. Accordingly, the

Fifth Circuit has failed totally to follow this Court's decisions in *Nolde Bros.* and *AT&T Technologies.*[5]

The Court Of Appeals Has Failed To Determine Whether The Issues Asserted Herein Are Substantively Arbitrable And The Court Has Failed To Consider The Forceful Evidence Presented Which Shows The Disputes Are Not Arbitrable.

The Fifth Circuit has failed to determine whether the parties intended that the asserted dispute would be arbitrable as required by *AT&T Technologies.* Its failure is, in part, owing to its narrow reading of this Court's decision in *AT&T Technologies.* The Fifth Circuit's reading of *AT&T Technologies* and *Nolde Bros.* also is not in harmony with the recent decision of the United States Court of Appeals for the Eighth Circuit in *Teamsters Local 238 v. C.R.S.T., Inc.,* 795 F.2d 1400 (8th Cir. en banc 1986), and of the National Labor Relations Board in *Indiana and Michigan Electric Co. and Local Union No. 1392, IBEW,* 284 NLRB No. 7 (May 29, 1987) (Petition For Review filed June 5, 1987; Docket No. 87-1247,

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[5] It is submitted that this Court's decision in *AT&T Technologies* requires the court in the first instance to properly frame the nature of the parties' dispute and determine whether the dispute arises under the agreement and whether the parties intended for the dispute to be arbitrable. The *AT&T* formulation gives precise meaning to the narrow holding of *Nolde Bros.* and, in fact, takes cognizance of the dissenters' view in *Nolde Bros.* (Mr. Justice Stewart with whom then Mr. Justice Rehnquist joined) that the court must determine whether there was an agreement between the parties to arbitrate the dispute. As Justices Stewart and Rehnquist stated in the *Nolde Bros.* dissent, had the court of appeals in *Nolde* addressed the *merits* of the litigation, the controversy would have been settled. In *AT&T Technologies,* this Court has expressly held that the court must in the first instance determine the question of arbitrability by looking to the terms of the agreement and other forceful evidence in determining whether there was an agreement to arbitrate. In the instant case, the Fifth Circuit has failed to read *Nolde Bros.* in light of *AT&T Technologies.*

United States Court of Appeals for the District of Columbia). It is respectfully submitted the National Labor Relations Board decision should be noted and accorded deference by this Court in reviewing whether the Fifth Circuit has properly considered *AT&T Technologies* and *Nolde Bros.* and the forceful evidence presented which shows the disputes herein are not arbitrable.

In *Indiana and Michigan,* the question before the Board was whether the company's refusal to arbitrate grievances based on alleged contract violations under the expired contracts constituted a violation of the company's duty to bargain under Section 8(a)(5) of the Act. The Board did find the company had violated Section 8(a)(5) and (1) of the Act, but held it would be inappropriate to remedy the company's repudiation of its contractual obligation to arbitrate by ordering arbitration. The Board determined the question whether the grievances are arbitrable turns on whether the claims "arise under" the expired agreements, as defined in *Nolde Bros.* However, the Board stated that *AT&T Technologies* had extended the *Nolde Bros.* analysis beyond the arbitration clause to the interpretation of the contract right invoked in determining arbitrability, and found that *mere invocation* of any term of the expired contract does not trigger the post-expiration duty to arbitrate under *Nolde Bros.*

That is, while the Board found the arbitration clauses to be sufficiently broad to survive contract expiration, the Board nonetheless held under *Nolde Bros.* and *AT&T Technologies* that a dispute based upon post-expiration events "arises under" the contract *only if* it concerns contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires. This conclusion is precisely the approach urged by National Marine in the Court below, and the approach adopted by the United States Court of Appeals for the Eighth Circuit in *Teamsters Local 238 v. C.R.S.T., Inc.*, 795 F.2d 1400 (8th Cir. *en banc* 1986).

The Fifth Circuit, however, refused to read *Nolde Bros.* in light of *AT&T Technologies* as the Eighth Circuit has in *Teamsters Local 238 v. C.R.S.T., Inc.*, and as the NLRB did in *Indiana and Michigan*, to determine whether the dispute herein "arises under" the agreement. *See Seafarers International Union v. National Marine Services, Inc.*, 821 F.2d at 152, 153 (5th Cir. 1987). Instead the Fifth Circuit looked only to the fact that the SIU had instituted its grievances and requested arbitration *before* the contract had expired and upon this factual acknowledgment held it could not be said with "positive assurance" that, at least to some extent, SIU's grievances did not colorably "arise under" the collective bargaining agreement. Former Chief Justice Burger *expressly rejected* this factor as determinative of the question whether the obligation to arbitrate disputes survives expiration of the contract in *Nolde Bros.* When *Nolde Bros.* is read in light of *AT&T Technologies* the Fifth Circuit's analysis must fail.

The Court of Appeals has wholly failed to consider the substantive contract provisions involved and the forceful evidence presented that these grievances do not "arise under" the agreement. Because the events complained of (the sale of the towboats and the accompanying lay offs) were not scheduled to occur and did not occur until after the expiration of the collective bargaining agreement, the SIU's *mere invocation* of the subcontracting and recognition clauses of the expired contract does not trigger the post-expiration duty to arbitrate. *See Teamsters Local 807 v. Brinks, Inc.*, 744 F.2d 283 (2d Cir. 1984).

The grievance in the instant case could only have been triggered by events which occurred after the expiration of the agreement; *i.e.* the sale of towboats to Compass and the accompanying layoff of all bargaining unit employees. Neither the subcontracting nor recognition provisions of the expired agreement invoked by SIU concern rights which could be worked toward or accumulated over time and there is no indication in these clauses

of the contract that the parties contemplated that such rights could ripen or remain enforceable after the contract expired. In fact, the recognition clause of the agreement expressly applies *only to* the "Life of the Agreement" and, thus, under *Nolde Bros.* and *AT&T Technologies*, there is forceful evidence presented from these substantive terms of the agreement itself that the parties did *not* intend grievances concerning these substantive provisions would remain arbitrable following expiration of the agreement. Moreover, the subcontracting clause of the agreement provides by its own terms for an exception to the no subcontracting provision when "no boat of the company is available for the performance of said work" and states only that the Company's *sole* obligation regarding a sale of towboats is to give the Union timely notice of that fact. Clearly, under these contract provisions the parties could not be found to have *intended* to arbitrate a dispute concerning the post-expiration sale of vessels. To conclude otherwise is to render the fact of contract expiration a meaningless event.

The Fifth Circuit has wholly failed to determine the question of substantive arbitrability in this case, and its cursory review incorrectly applies the law to the facts in this case. It is respectfully submitted that this Court should grant certiorari and review whether or not the principles enunciated by this Court in *Nolde Bros.* and *AT&T Technologies* have been followed by the Fifth Circuit, or whether they have been ignored or misapplied.

The Court Of Appeals Decision Calls Into Question This Court's Decision In *Nolde* And Misapprehends Its Duty To Follow *AT&T Technologies*.

The Court of Appeals acknowledges that its understanding and application of this Court's *Nolde* decision is in "some tension" with general principles of contract law. Moreover, the Court also recognized that the District Court's opinion, which concluded that arbitration was unavailable, "reflects intelligence and fairness coupled with an understanding of the

principles of contract law and arbitration." Nevertheless, the Court held it could not "square" its understanding of *Nolde* with the District Court's decision and, accordingly, the Court of Appeals reversed.

Under the Fifth Circuit's reading of *Nolde,* no distinction can be drawn "between disputes involving rights that accrue" and disputes "involving right [sic] that do not accrue under the collective bargaining agreement." *Seafarers International Union v. National Marine Services, Inc.,* 821 F.2d at 152. However, it is clear from this Court's decision in *Nolde,* and its express reliance therein upon *John Wiley & Sons,* that rights *must* accrue during the term of an agreement (or "arise under" the agreement) for the duty to arbitrate to attach. The question under *Nolde* is whether the parties have agreed that such accrued rights may be realized, and, accordingly, arbitrated *after* the agreement has expired. *See Nolde Bros.,* 430 U.S. at 249, *quoting John Wiley & Sons,* 376 U.S. at 555. In order for a court to find under *Nolde* that the dispute "arises under" the contract, the dispute must be over an obligation "arguably created by" the agreement or "accruing" under the agreement.

The Fifth Circuit's decision in the instant case is, not only, as the Court states, at "some tension" with general principles of contract law, it is also at great variance from this Court's controlling precedents in *Nolde* and *AT&T Technologies.* While the Fifth Circuit first undertakes an analysis of whether the duty to arbitrate continues after contract expiration by looking only to the arbitration clause - under its understanding of *Nolde* - such analysis renders its second level determination, under *AT&T Technologies,* of whether the grievances are arbitrable hollow, superfluous and meaningless.

While the Fifth Circuit has attempted to split the *Nolde* - *AT&T Technologies* contract analysis into two unrelated parts, its obligation to *interpret* the contract and to determine *whether*

the parties are bound to arbitrate, and, if so, *what issues* must be arbitrated stems from this Court's decisions in *John Wiley & Sons* and *Nolde,* as clarified by this Court in *AT&T Technologies.* Therefore, the Court of Appeals' failure to undertake any analysis herein of *what* issues must be arbitrated, because of its extremely narrow reading of *AT&T Technologies* and its all engulfing, but flawed, reading of *Nolde Bros.*, requires review by this Court.

This Court is respectfully urged to correct the Fifth Circuit's flawed analysis and misapplication of this Court's controlling precedents herein.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Attorneys for Petitioner,
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Dated: September 28, 1987

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-3321

Seafarers International Union of North America,
Plaintiff-Appellant,

vs.

National Marine Services, Inc., et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before BROWN, REAVLEY and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

National Marine Services, Inc. ("National Marine") sold off its tugboat operation and laid off its employees the day after the expiration of the collective bargaining agreement between National Marine and Seafarers International Union ("SIU"), which represented the laid off workers. SIU claimed that the sale and layoff was a subterfuge that violated the subcontracting provisions of the expired agreement and sought arbitration under the arbitration clause of the expired agreement.

SIU now appeals from the district court's denial of its motions to compel arbitration and its motion for an injunction prohibiting the sale and layoff. 639 F.Sup. 1283. Because it has been rendered moot, we dismiss SIU's appeal from that part of the district court's order denying injunctive relief. However, since we find that the district court erred by denying SIU's motion to compel arbitration, we reverse its judgment.

I

National Marine is engaged in the barge transportation industry, operating a large fleet of barges primarily for transporting liquid petroleum products. National Marine formerly operated about eighteen towboats in connection with its barge operations. SIU is an unincorporated labor organization that represents employees of National Marine who were laid off when National Marine sold fourteen of its towboats to the defendant-appellee, Compass Marine Propulsion, Inc. ("Compass"). Compass is also engaged in the barge transportation industry, specializing in the towing business.

National Marine and SIU were parties to a collective bargaining agreement which was effective between October 9, 1982, and October 8, 1985. The agreement contained a provision barring National Marine from subcontracting out work except under certain limited circumstances.[1] The agreement also contained an extremely broad arbitration clause.[2]

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[1] The subcontracting clause of the agreement provides:

> The Company shall not subcontract out any work which is customarily performed by the Union unless either:
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> A. All employees of the Company who are available for employment are employed and the Company is unable to obtain men from the Hiring Hall or the Harry Lundeberg School of Seamanship; or
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> B. No boat of the Company is available for the performance of said work. In no such case shall the Company subcontract out any work for more than one (1) year.

[2] The arbitration clause provides:

> All complaints, disputes or grievances arising between the parties hereto relating to or in connection with or involving questions of interpretation or application of any clause of this Agreement, or any acts, conduct or relations between the parties, directly or indirectly, shall be processed pursuant to this Article.

In 1985, while experiencing financial difficulties, National Marine decided to sell its tugs in order to streamline its operations and raise cash. It contracted with Compass to sell fourteen of its eighteen tugs, effective October 9, 1985, for $5,275,000. At the same time National Marine and Compass also entered into a towage contract whereby Compass agreed to dedicate the tugs to move National Marine's barges. In a letter dated September 26, 1985, National Marine informed SIU of its agreement with Compass and stated that as a result of the transactions all bargaining unit personnel (these workers were represented by the union) would be laid off permanently on October 9, 1985, at the expiration of the collective bargaining agreement. On September 27, 1985, pursuant to a collective bargaining agreement between the parties (also called "the agreement"), the SIU filed grievances challenging the sale of the tugs and the layoff of its members. Its grounds were that the sale of the tugs was a sham and the sale and towage agreement constituted a subcontracting of bargaining unit work in violation of the collective bargaining agreement and that the layoff of its members was a violation of the recognition clause of the collective bargaining agreement. On October 4, 1985, the SIU demanded arbitration of its September 27 grievances pursuant to the binding arbitration provisions of the collective bargaining agreement. National Marine refused to submit to arbitration because, among other reasons, the collective bargaining agreement, by its terms, was effective only from October 9, 1982, through October 8, 1985, and therefore the sale and the layoffs would not occur until after its expiration.

II

On October 7, SIU, the plaintiff-appellant, filed an action against National Marine and Compass under section 301(a) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185(a). In its complaint, SIU sought:

(1) An order compelling National Marine to submit the SIU's grievances over National Marine's proposed sale to binding arbitration; and

(2) An injunction prohibiting National Marine and the defendant-appellee from effectuating the sale of the tugs and prohibiting National Marine from laying off bargaining unit employees pending arbitration of the SIU's grievances over the proposed sale.

On October 30, and November 7 National Marine and Compass respectively filed their answers to SIU's complaint.

On October 8, the district court held a hearing on SIU's request for a temporary restraining order. The district court denied SIU's request for temporary injunctive relief by order dictated into the record.

On October 30, the district court conducted a trial on SIU's request for a preliminary injunction and the matter was then submitted for disposition.

On March 28, 1986, by minute entry, the district court ordered that SIU's complaint for injunctive relief be dismissed, and on July 18, the district court issued its written opinion denying SIU's complaint for injunctive relief. The district court held that SIU's grievances did not involve contractual rights under the collective bargaining agreement, but rather involved statutory rights under the National Labor Relations Act, §§ 7 and 8, as amended, 29 U.S.C. §§ 157, 158. The district court concluded that the proper forum for adjudication of those statutory rights was the National Labor Relations Board, not the federal district court.

III

As a threshold matter, we must first decide whether this appeal should be dismissed on mootness grounds. We note that the actions that SIU had sought to enjoin (the sale of the four-

teen tugboats and the accompanying layoff of workers) have already taken place. An appeal from a denial of a motion for preliminary injunction is rendered moot when the act sought to be enjoined has occurred. *Marilyn T., Inc. v. Evans,* 803 F.2d 1383, 1384 (5th Cir. 1986); *Thournir v. Buchanan,* 710 F.2d 1461, 1463 (10th Cir. 1983); *In re Cantwell,* 639 F.2d 1050, 1054 (3d Cir. 1981). The rationale for this rule was explained by the court in the *Marilyn T.* decision, which held that once the action that the plaintiff sought to have enjoined has occurred, the case is mooted because "no order of this court could affect the parties' rights with respect to the injunction we are called upon to review." 803 F.2d at 1384 (quoting *Honig v. Students of the California School for the Blind,* 471 U.S. 148, 149, 105 S.Ct. 1820, 1821, 85 L.Ed.2d 114 (1985)). The court went on to explain that the appeal from denial of injunctive relief is mooted even where the court could fashion other relief for the appellant:

> Marilyn T. maintains, nevertheless, that its appeal is not moot because it continues to suffer harm from the loss of its license. It argues that this court can fashion effective relief by declaring the suspension *and* revocation procedures unconstitutional and ordering reinstatement of its license. These concerns are not properly before the court, however. This appeal is from the denial of a preliminary injunction. The sole issue concerning the denial is whether the initial suspension should have been enjoined. Whether the later revocation was proper has not yet been decided by the district court. Nor has the district court decided whether Marilyn T. is entitled to damages for either the suspension or revocation. To grant the relief that Marilyn T. now requests, we would have to decide these issues. Because these issues have yet to be resolved by the district court, they are not before us on appeal.

Marilyn T., 803 F.2d at 1383-84.

Nevertheless, there is an exception to the mootness doctrine. A case that is otherwise moot can be decided if: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subject to the same action again." *Weinstein v. Bradford,* 423 U.S. 147, 149, 96 S.Ct. 347, 349, 46 L.Ed.2d 350 (1975); *Marilyn T., Inc.,* 803 F.2d at 1384.

Although the first prong of this test has been met in this case because the transaction which SIU sought to enjoin occurred prior to argument of this appeal (SIU did not seek a stay pending appeal) the second prong has not been met. National Marine's sale of virtually the whole of its tugboat fleet to Compass is a one-time occurrence.

Since the action that SIU sought to enjoin has already occurred, and since there is no reasonable expectation that SIU will be subject to the same action again, we dismiss SIU's appeal from the district court's denial of its motion for a preliminary injunction.

This action does not dispose of the whole appeal, however, because SIU also sought from the district court an order compelling National Marine to arbitrate SIU's grievance. And because SIU makes a colorable argument that it was and is entitled to seek some relief through arbitration, we do not believe that SIU's appeal from the denial of its arbitration request is mooted. Accordingly, we will exercise our jurisdiction to review the district court's order insofar as it deals with SIU's motion to compel arbitration.

IV

Turning to the merits of this appeal, we must resolve two related issues: (1) whether a federal court has the power to compel arbitration in this case, and (2) if so, whether the dispute between SIU and National Marine is arbitrable. We hold that both of these issues must be resolved in favor of arbitration.

The district court concluded that arbitration was unavailable in this case because arbitration is a creature of contract and since the collective bargaining agreement that contained the arbitration clause had expired, any duty to arbitrate had also expired. Although noting that the Supreme Court in *Nolde Bros., Inc. v. Local No. 358 Bakery & Confectionary Workers Union,* 430 U.S. 243, 97 S.Ct. 1067, 51 L.Ed.2d 300 (1977), had held that federal courts may compel arbitration even after expiration of the collective bargaining agreement, the district court nevertheless held that that decision applied only to arbitration claims involving accruable rights under the collective bargaining agreement, and hence did not affect this case. The district court's opinion reflects intelligence and fairness coupled with an understanding of the principles of contract law and arbitration. But we cannot square the district court's decision with our own understanding of *Nolde,* and therefore must reverse.

Contrary to the district court's holding, we believe that the Supreme Court's decision in *Nolde* must be read as broadly holding that the expiration of a collective bargaining agreement does not extinguish the duty to arbitrate disputes under the agreement. Our reading of *Nolde* is based upon both the language of the opinion and the history of the case. In *Nolde,* the employer closed down one of its plants after the collective bargaining agreement between it and the union representing the employees at the plant had expired and after negotiations for a new agreement had failed. The employer refused to give severance pay to the employees at the closed plant although severance pay was specifically provided for in the expired collective bargaining agreement. The district court held that since the severance pay was a creature of contract, the employees' right to it expired with the collective bargaining agreement. *Local 358, Bakery & Confectionary Workers, Ind. U. v. Nolde Bros., Inc.,* 382 F.Supp. 1354, 1358 (E.D.Va. 1974). In addition, the district court held that the duty to arbitrate is created by contract and "no obligation to arbitrate a labor dispute arises solely

by operation of law." *Id.* at 1359 (quoting from *Gateway Coal Co. v. U.M.W.*, 414 U.S. 368, 374, 94 S.Ct. 629, 635, 38 L.Ed.2d 583 (1974)). The Fourth Circuit reversed. *Local No. 358, Bakery & Confectionery Workers, Ind. U. v. Nolde Bros., Inc.*, 530 F.2d 548 (4th Cir. 1975). The court of appeals first held that the district court erred because it first determined whether the company's severance pay obligations survived the contract when the court should have first determined whether or not the company's duty to arbitrate the severance pay issue survived the contract. *Id.* at 550. The court then determined that the duty did survive because, the court concluded, when a dispute turns on whether parties intended certain accruable rights to be enjoyable even after contract expiration, the dispute must be arbitrated if the contract provided for arbitration of such disputes. *Id.* at 552. The Fourth Circuit's position was essentially the one that the appellees and the district court in this case have taken, since the Fourth Circuit also noted: "[o]ur decision should not be read as disapproving those cases that hold arbitration unavailable for resolution of individual employee grievances, or disputes involving nonaccruable rights, that arise after expiration of a collective bargaining agreement." *Id.* at 553.

The Supreme Court affirmed, but on a different basis, *Nolde Bros., Inc. v. Local No. 358 Bakery & Confectionery Workers Union*, 430 U.S. 243, 97 S.Ct. 1067, 51 L.Ed.2d 300 (1977). Citing the strong, established federal policy favoring arbitration, as well as the fact that the very presence of an arbitration clause denotes the parties' preference for arbitration over adjudication, the Court held that as a general rule of interpretation, arbitration clauses are presumed to govern grievances under the collective bargaining agreement that occur *after* the expiration of the agreement, unless the arbitration clause states otherwise:

> [T]he parties' failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an

> intent to have arbitration obligations cease with the agreement, affords a basis for concluding that they intend to arbitrate all grievances arising out of the contractual relationship. *In short, where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication.*

430 U.S. at 255, 97 S.Ct. at 1074 (emphasis added).

The Court implicitly rejected the narrower approach followed by the Fourth Circuit (which National Marine urges this court to adopt), since, although squarely presented as an issue, the Court did not draw any distinction between disputes involving rights that accrue and disputes involving right that do not accrue under the collective bargaining agreement. Had the Court decided to base its decision on such a distinction, it could have easily adopted the Fourth Circuit's approach, which it had before it. But the Court chose not to do so. We therefore reject National Marine's contention that the *Nolde* decision applies only to rights that accrue under the collective bargaining agreement.

Our conclusion is in accordance with decisions by the Third and Ninth Circuits. In *Federated Metals Corp. v. United Steelworkers*, 648 F.2d 856 (3d Cir.1981), the court stated:

> We do not believe that the somewhat esoteric determination that the disputed right to a particular benefit has vested or accrued should control the decision whether the duty to arbitrate the dispute survives contract termination. When the parties have agreed to a broad arbitration clause, the duty to arbitrate survives termination of the agreement if the dispute arises under the expired agreement; when the parties have agreed to a narrow arbitration clause, the duty to arbitrate survives if the dispute is over one of the specified arbitrable subjects *and* arises under the expired agreement. It is not necessary that the disputed right have

> vested because there is nothing to prohibit the parties from agreeing that certain benefits might accrue after the contract has expired.

Id. at 861.

The Ninth Circuit has also explicitly rejected the position that the duty to arbitrate survives only when the grievance involves "rights undeniably *accruing* under the contract *prior to termination.*" *Local Joint Executive Board v. Royal Center, Inc.*, 796 F.2d 1159 (9th Cir.1986).[3]

Our decision is also in accord with our prior ruling in *International Brotherhood of Boilermakers v. Delta Southern Co.*, 602 F.Supp. 625 (M.D.La.1985), *aff'd* 782 F.2d 1038 (5th Cir.1985) (no published opinion). In that case the district court read *Nolde* as creating a broad presumption in favor of arbitration. 602 F.Supp. at 629. The district court rejected the defendant's contention that the *Nolde* holding was limited to disputes that could have been arbitrated before the expiration of the collective bargaining agreement. *Id.* In an unpublished opinion, this court affirmed.

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[3] National Marine cites the Eighth Circuit's narrow reading of *Nolde* in *Chauffeurs, Teamsters and Helpers v. C.R.S.T., Inc.*, 795 F.2d 1400 (8th Cir.1986) (en banc), in support of its position. Although it is true that the decision's reading of *Nolde* differs from ours, it does not follow that the Eighth Circuit would arrive at a different result in this case. The Eighth Circuit based its conclusion that arbitration was unavailable on its findings that (1) the dispute was based wholly on events that occurred after expiration of the collective bargaining agreement and (2) the disputed right did not occur within a reasonable time after expiration of the agreement. Neither of these factors is present in this case. The dispute between National Marine and SIU involved at least in part National Marine's sale and towage agrements with Compass, which occurred while the collective bargaining agreement was still in force. The court in *Chauffeurs* recognized that disputes that relate to events occurring while the agreement is still in effect remain arbitrable after the agreement's expiration. 795 F.2d at 1403.

The scope of the rule articulated by the Supreme Court in *Nolde* is broad: disputes grounded on a collective bargaining agreement containing an arbitration clause are arbitrable even after expiration of the agreement unless the arbitration clause states otherwise. Applying this rule to this case, it is clear that the duty to arbitrate was not extinguished by the expiration of the collective bargaining agreement. The arbitration clause agreed to by SIU and National Marine, which is as broad as any that we have seen, makes no mention of the effect of expiration of the agreement on a right to arbitrate:

> All complaints, disputes or grievances arising between the parties hereto relating to or in connection with or involving questions of interpretation or application of any clause of the Agreement, or any acts, conduct or relations between the parties, directly or indirectly, shall be processed pursuant to this Article.

We must therefore conclude that the district court erred when it held that the expiration of the collective bargaining agreement ended National Marine's duty to arbitrate grievances under the agreement.

V

Having determined that National Marine remained under a duty to arbitrate grievances under the collective bargaining agreement after its expiration, we now turn to the issue of whether SIU's grievances against National Marine are arbitrable. We hold that they are.

Although the question of arbitrability is a matter for judicial determination, *AT & T Technologies, Inc. v. Communications Workers of America*, ____ U.S. ____, 106 S.Ct. 1415, 1417, 89 L.Ed.2d 648 (1986), our inquiry is limited. An order to arbitrate a grievance "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute. Doubts should

be resolved in favor of coverage." *AT & T Technologies,* 106 S.Ct. at 1419 (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960)).

SIU's position is that National Marine's sale and towage agreements with Compass, along with the accompanying layoffs of tugboat workers, violated the collective bargaining agreement's recognition clause[4] as well as the agreement's restrictions on subcontracting.[5] Specifically, SIU alleges that National Marine's transactions with Compass, which involved selling the tugboat fleet to Compass with Compass's agreeing to use the tugboats to do work for National Marine using Compass employees, were a "sham" deliberately designed to circumvent

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[4] The recognition clause provided:

> The Company recognizes the Union as the exclusive bargaining representative of all vessel crew personnel and shorebased tankermen except Captains, Relief Captains, Pilots/Mates and Engineers employed on tugboats, towboats, dredges, and/or barges owned or operated by the Company excluding shipyard division personnel (both at the present or at any time during the life of this Agreement by the Company or any of its subsidiaries [whether so at present or at any time during the life of this Agreement]) as an owner or under a bareboat charter, but the employees included in the bargaining unit for which the Union is recognized and who are covered by this Agreement are sometimes hereinafter referred to as "employees".
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> The term "subsidiary" shall be deemed to include any waterways transportation entity, owned by the Company.
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> The Union may, at its discretion at any time, require that such subsidiary execute an Agreement. The failure of the Union to request a subsidiary to sign this Agreement shall not in any way effect the obligations of the Company herein that this does cover and include all the employees on all the vessels described above, whether owned or operated by the Company or any of its subsidiaries.

[5] *See* note 1.

the restrictions of the agreement's subcontracting and recognition clauses.[6] Having examined the relevant clauses of the collective bargaining agreement, we cannot say with "positive assurance" that they are "not susceptible of an interpretation that covers the dispute" between National Marine and SIU. We therefore hold that SIU's grievances are arbitrable.

National Marine contends that SIU's grievances are not arbitrable for two reasons: (1) the conduct of National Marine to which SIU objects occurred after expiration of the agreement and thus SIU's claim did not "arise under" the collective bargaining agreement, and (2) SIU's claims are devoid of merit. We do not, however, believe that either of these arguments suffices to preclude arbitration.

Although it is true that the sale of the tugboats and the accompanying employee layoffs were not scheduled to occur and did not occur before the expiration of the collective bargaining agreement, SIU complains that conduct occurring prior to the agreement's expiration constituted a breach, specifically the sale and towage agreements between National Marine and Compass. In fact, even before the collective bargaining agreement expired, SIU had instituted its grievances against National Marine and had requested arbitration on grounds that the agreements between National Marine and Compass were already in violation of the collective bargaining agreement. We thus cannot say with "positive assurance" that, at least to some extent, SIU's grievances did not colorably "arise under" the collective bargaining agreement.

In any event, under *Nolde* whether the conduct complained of occurred during the life of the agreement or after its expiration is not necessarily dispositive of whether a dispute arises

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[6] SIU also claims that the timing of the sale of tugboats to Compass violated a ninety-day notice provision in the agreement. National Marine has agreed to arbitrate this dispute.

under the agreement.[7] *Nolde* itself involved post-contract conduct.

National Marine contends that SIU's claims lack merit. That may be so, but that question is not germane to our inquiry. "[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT & T Technologies,* 106 S.Ct. at 1419. This is true even where the claims appear frivolous to the court. *Id.*

We acknowledge that our understanding and application of the Supreme Court's *Nolde* decision is in some tension with general principles of contract law. We frankly do not perceive any traditional legal principles that support the court's broad holding. We believe, however, that the Supreme Court's decision in *Nolde* was driven by a preference for judicial economy through the use of arbitration, and by a belief that labor-management disputes relating to terms of collective bargaining agreements should be addressed by an arbitrator in the first instance.

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[7] Of course, the layoff of the workers, which occurred after the expiration of the agreement, could not by itself constitute a breach of the agreement, since the agreement had expired. In order to constitute a breach, the layoff would have to relate back to conduct that occurred while the collective bargaining agreement was still in effect. *See Graphic Communications Union v. Chicago Tribune Co.,* 794 F.2d 1222 (7th Cir.1986); *Local 807, International Brotherhood of Teamsters v. Brinks, Inc.,* 744 F.2d 283 (2d Cir.1984); *O'Connor Co. v. Carpenters Local Union No. 1408,* 702 F.2d 824 (9th Cir.1983).

VI

For the reasons discussed earlier, SIU's appeal from the denial of a preliminary injunction is dismissed, but the judgment of the district court denying SIU's motion to compel arbitration is reversed. This case is remanded for proceedings consistent with this opinion and with instructions to enter an order compelling arbitration between SIU and National Marine.

DISMISSED IN PART, REVERSED IN PART AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 85-4618

Section "G"

Seafarers International Union,

vs.

National Marine Services, Inc., et al.

OPINION

This is an action to enforce a collective bargaining agreement.

The plaintiff, the Seafarers International Union of North America, Atlantic, Gulf Lakes, and Island Waters ("the SIU" or "the union"), is an unincorporated labor organization representing employees of defendant National Marine Services, Inc. ("National Marine" or "the employer"). The defendants, National Marine and Compass Marine Propulsion, Inc. ("Compass"), are employers in an industry affecting commerce within the meaning of 29 U.S.C. §§ 142, 185.

Jurisdiction is exercised pursuant to section 301 of the Labor management Relations Act of 1947, 29 U.S.C. § 185(a).[1]

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[1] 29 U.S.C. § 185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

I. FACTS

The dispute which is the subject of this action was precipitated by recent financial difficulties experienced by National Marine. National Marine is engaged in the barge transport business, primarily the transport of liquid petroleum products. It operates a large fleet of barges and formally operated about 18 tugs in connection with the barges.

In 1985, National Marine decided to sell its tugs in order to streamline its operations and raise cash. It contracted with Compass to sell 14 tugs effective October 9, 1985 for $5,275,000. At the same time National Marine and Compass also entered into a towage contract whereby Compass agreed to dedicate the tugs to move National Marine's barges. In conjunction with the sale, National Marine laid off its employees working on the tugs effective October 9th.

On October 9, 1985, Compass employees assumed operation of the tugs and have operated them since. The status of the sale, however, is unclear. The purchase price has not yet been paid and it is still unclear who has title to the tugs.

The SIU represents the National Marine employees who were laid off because of the sale. On September 27, 1985, pursuant to a collective bargaining agreement between the parties (also called "the agreement")[2], the SIU filed grievances challenging the sale of the tugs and the layoff of its members. Its grounds were that the sale of the tugs was a sham and the sale and towage agreement constituted a subcontracting of bargaining unit work in violation of the collective bargaining agreement

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[2] Actually, there were 2 collective bargaining agreements, one covering about 90 unlicensed employees, primarily tankermen, ("Unlicensed Agreement") and the other covering about 40 licensed employees, captains, mates, pilots and engineers ("Licensed Agreement"). The provisions of the 2 agreements material to this action are for all intents and purposes the same. Consequently, the 2 agreements are treated as one.

and that the layoff of its members was a violation of the recognition clause of the collective bargaining agreement. On October 4, 1985, the SIU demanded arbitration of its September 27th grievances pursuant to the binding arbitration provisions of the collective bargaining agreement. National Marine refused to submit to arbitration because, among other reasons, the collective bargaining agreement, by its terms, was effective only from October 9, 1982 through October 8, 1985, and therefore the sale and the layoffs would not occur until after its expiration.

On October 7, 1985, the SIU brought this action for temporary restraining order, preliminary injunction and permanent injunction seeking: (1) an order compelling National Marine to submit the September 27th grievances to binding arbitration as set forth in the collective bargaining agreement; and (2) an injunction prohibiting National Marine and Compass from effecting the sale of the tugs and prohibiting National Marine from laying off bargaining unit employees pending arbitration of the September 27th grievances.

On October 8, 1985, a hearing was held on the SIU's request for temporary restraining order and the request was denied because it was not justified on a balancing of the equities.

The matter is now before the Court following a hearing on the SIU's request for preliminary injunction.

II. REQUIREMENTS OF A LABOR INJUNCTION IN SUPPORT OF ARBITRATION

The jurisdiction of the federal courts to grant injunctive relief in cases arising out of labor disputes is sharply limited by the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115.

The district courts, however, do have jurisdiction under section 301 of the Labor Management Relations Act of 1947 over suits for violation of a collective bargaining agreement. 29

U.S.C. § 185(a). The district courts' jurisdiction under section 301 includes jurisdiction to grant injunctive relief in support of a mandatory arbitration clause. *Boys Market, Inc. v. Retail Clerk's Union, Local 770,* 398 U.S. 235 (1970); *Cf., Textile Workers Union v. Lincoln Mills of Ala.,* 353 U.S. 448 (1957). The district courts may grant injunctive relief against either an employer or a union in order to maintain the status quo relationship between the parties pending the results of arbitration under their collective bargaining agreement. *See e.g., Gulf Coast Indus. Workers' Union v. Exxon,* 712 F.2d 161 (5th Cir. 1983) (dictum); *Int'l Union v. Dana Corp.,* 679 F.2d 634 (6th Cir. 1982); *Local Lodge 1266 Int'l Ass'n of Machinists v. Panaramic Corp.,* 668 F.2d 276 (7th Cir. 1981); *United Steelworkers v. Fort Pitt Steelcasting,* 598 F.2d 1273 (3rd Cir. 1979); *Lever Brothers Co. v. Int'l Chemical Workers Local 217,* 554 F.2d 115 (4th Cir. 1976).

The requirements for granting status quo injunctive relief in support of arbitration are: (1) the underlying grievance is subject to mandatory binding arbitration under a collective bargaining agreement, i.e. arbitrability; (2) the party seeking the injunctive relief is ready and willing to submit the grievance to arbitration; and (3) injunctive relief is warranted under ordinary principles of equity.[3] *Jacksonville Bulk Terminals, Inc. v. Int'l*

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[3] Ordinarily preliminary injunctive relief is only appropriate where the party seeking relief establishes: (1) a substantial likelihood that it will prevail on the merits; (2) a substantial threat that irreparable injury will result to it if the preliminary injunction is not granted; (3) that the threatened injury to it outweighs any threatened harm to the other parties; and (4) that granting the preliminary injunction will not disserve the public interest. *Mississippi Power & Light v. United Gas Pipe Line,* 760 F.2d 618, 621 (5th Cir. 1985).

Where the injunction is sought in support of arbitration the requirement that the party seeking relief establish a substantial likelihood of prevailing on the merits is often diluted. Generally, the party seeking relief need not show that it will prevail in ar-

Longshoremen's Ass'n, 457 U.S. 702, 721 (1982); *Buffalo Forge v. United Steelworkers,* 428 U.S. 397, 407 (1976); *Gateway Coal Co. v. United Mine Workers,* 414 U.S. 375, 374 (1974); *Boys Market, supra,* 398 U.S. at 254.

III. ARBITRABILITY

The threshold issue dispositive of the relief the union seeks is whether its September 27th grievances are arbitrable. If they are not, then the union is not entitled to either an order compelling arbitration or an injunction of the sale of the tugs in support of arbitration, and its complaint must be dismissed. The issue of arbitrability is a question of law which the court must decide. *AT&T Technologies, Inc. v. Communications Workers of America,* 106 S. Ct. 1415, 1418 (1986); *Int'l Union of Operating Engineers v. Flair Builders, Inc.,* 406 U.S. 487, 491 (1972).

A. The Union Grievances and the Collective Bargaining Agreement

The essence of the union's September 27th grievances is that National Marine effectively fired union members and replaced them with nonunion labor pursuant to a subcontracting agreement with Compass. The union argues that this conduct violated its contractual rights under the no subcontracting clause[4] and the recognition clause[5] of the collective bargaining

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bitration. Rather it need only establish that the position it will espouse in arbitration is sufficiently sound to prevent arbitration from being a futile endeavor. This difference is required to prevent the courts from encroaching upon the domain of the arbitrator. *Aluminum Workers Int'l v. Consol. Aluminum Corp.,* 696 F.2d 437, 442 n.2 (6th Cir. 1982); *Lever Brothers, supra,* 554 F.2d at 1?0 (4th Cir. 1976).

[4] Unlicensed Agreement, article V, section 16 and Licensed Agreement, article V, section 15 provide:

> The Company shall not subcontract out work which is customarily performed by the Union unless either:

agreement. The union further argues that whether National Marine's conduct violated its rights under the collective bargaining agreement must be submitted to arbitration in accordance with the mandatory arbitration clause of the agreement.

The arbitration clause requires that:

> All complaints, disputes or grievances arising between the parties hereto relating to or in connection with or involving questions of interpretation or application of any clause of this Agreement, or any acts, conduct or relations between the parties, directly or indirectly, shall be processed pursuant to this Article.[6]

The clause requires arbitration of: (1) all grievances related to the parties contractual rights under the term of the agreement; and (2) all grievances related to the relations between parties. If the union's grievances challenged conduct by National Marine

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> A. All employees of the Company who are available for employment are employed and the Company is unable to obtain men from the Hiring Hall or the Henry Lundeberg School of Steamship, or,
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> B. No boat of the Company is available for the performance of said work. In no case shall the Company subcontract out any work for more than one (1) year.

[5] Unlicensed Agreement, article 1, section 1 provides in part:

> The Company recognizes the Union as the exclusive bargaining representative of all vessel crew personnel and shorebased tankermen . . .

Licensed Agreement, article 1, section 1 provides in part:

> The Company recognizes the Union as the exclusive bargaining representative for all Captains, Relief Captains, Pilots/Mates and Engineers employed on tugboats, dredges, and/or barges owned or operated by the Company . . .

[6] Unlicensed Agreement, article II, paragraph A. Licensed Agreement, article II, paragraph A.

which effected the parties' rights or relations under the agreement then the arbitration clause would presumptively require that National Marine submit the grievance to arbitration. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

The union's grievances, however, challenge conduct of National Marine which effected the union only after the expiration of the collective bargaining agreement. The agreement expired on October 8, 1985.[7] Through that date, National Marine owned the tugs and employed only union members on them. At no time during the life of the agreement did National Marine layoff union members or employ nonunion labor.[8] Not until October 9, 1985 did National Marine sell the tugs and layoff union members. If National Marine violated the union's rights under the collective bargaining agreement by subcontracting out work to Compass, that violation did not occur before October 9th when Compass employees first displaced union members on the tugs.

B. The Effect of the Expiration of the Collective Bargaining Agreement

The expiration of the collective bargaining agreement on October 8th profoundly changed the relations of the parties. Before October 8th, National Marine was obligated under the

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[7] The collective bargaining agreement between the SIU and National Marine, by its terms, was effective from October 9, 1982 through October 8, 1985. Both parties gave written notice 60 days prior to the expiration date of their intention to terminate the agreement as required by section 8(d) of the National Labor Relations Act, 29 U.S.C. § 159(d).

[8] During the life of the collective bargaining agreement, National Marine prepared to sell the tugs and layoff union members upon the expiration of the agreement. The agreement, however, does not prohibit this conduct.

agreement not to subcontract. After October 8th, the agreement had expired and it is elementary that after the expiration of the agreement, the parties were no longer bound to its terms by operation of the agreement.

The parties, however, were still bound by operation of law to some of the terms of the agreement even after its expiration. The parties could not unilaterally change the "terms and conditions of employment" until they fulfilled their duty to bargain in good faith over those terms and conditions. *N.L.R.B. v. Katz,* 369 U.S. 736 (1962); 29 U.S.C. § 159(d).[9] The terms and conditions of employment which are mandatory subjects of bargaining and which neither party could unilaterally change before fulfilling its obligation to bargain include the clause on the subcontracting of bargaining unit work. *Fibreboard Paper Products Corp. v. N.L.R.B.,* 379 U.S. 203 (1964). Therefore, even after October 8th, National Marine was obligated not to subcontract, but the obligation was imposed not by the agreement but by operation of law.

If National Marine subcontracted bargaining unit work after the expiration of the agreement without first fulfilling its duty to bargain, then it breached its duty to bargain in good faith.[10] That breach would constitute an "unfair labor practice." 29 U.S.C. §§ 159(a)(5),)b)(3). The National Labor Relations Board ("NLRB") has jurisdiction over claims of unfair labor

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[9] If a party bargains in good faith until an impasse is reached, then the party is free to implement unilateral changes so long as the changes were offered to the other side during bargaining. *Huck Manufacturing. Co. v. N.L.R.B.,* 693 F.2d 1176, 1186 (5th Cir. 1982)

[10] National Marine denies that its arrangement with Compass was a subcontracting of bargaining work over which it had a duty to bargain. It argues that it sold the tugs to Compass. It further argues that the sale was an exercise of its entrepreneurial right to sell its assets and close part of its business over which it has no duty to bargain. *First National Maintenance Corp. v. N.L.R.B.,* 452 U.S. 615 (1981); *Otis Elevator,* 269 NLRB No. 162 (1984).

practices. 29 U.S.C. § 160.[11] The NLRB is empowered to prevent and remedy those practices. If injunctive relief is appropriate, the NLRB is authorized to petition the district courts for such relief. 29 U.S.C. § 160(j).

That breach, however, would not constitute a breach or violation of the collective bargaining agreement because the agreement had expired. On October 9th, the parties' legal rights and obligations were no longer governed by the agreement. They were governed by the National Labor Relations Act ("NLRA") which operated to maintain the status quo terms and conditions of employment established in the agreement while the parties bargained over a new agreement. Because the union's grievances challenge conduct by National Marine which affected the union's rights after October 9th, these grievances are not related to the union's rights under the agreement, but rather are related to the union's rights under the NLRA. The union's grievances, therefore, are not arbitrable under the arbitration clause. The union's proper forum is not this court or an arbitrator but the NLRB.

The union, nevertheless, advances two arguments in support of its position that its grievances are arbitrable under the arbitration clause of the collective bargaining agreement. First, the union argues that the arbitration clause is a term and condition of employment which continues in effect by operation of law after the expiration of the agreement just as the subcontracting clause of the agreement continues in effect. The union argues that even after October 8th, the parties were still bound to arbitrate all grievances related to their post-expiration relations even though those relations were governed by the NLRA and not the agreement. Second, the union argues that its grievances are related to rights which, although deriving their force from the NLRA, were initially established in the agree-

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[11] NLRB decisions are appealed directly to the Court of Appeals. 29 U.S.C. § 160(f).

ment and derive their meaning from the interpretation of the agreement. This second argument is more limited than the first. The second argument is that the parties obligation to arbitrate grievances related to their post-expiration relations only encompasses those grievances related to rights established under the expired agreement itself — e.g., the union's rights under the no subcontracting clause.

C. The Function of Arbitration

The union's argument that the arbitration clause continues in effect by operation of law after the expiration of the collective bargaining agreement must be rejected because it is contrary to a basic understanding of the function of arbitration in labor relations.

The national labor policy is to promote industrial peace by fostering the development by employers and their employees of a system of self-government mutually consented to through the collective bargaining process. *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* 363 U.S. at 578-580. Labor arbitration is at the heart of industrial self-governance. *Id.* at 581. Arbitration is the parties' mutually agreed upon method of privately resolving disputes over the meaning of their collective bargaining agreement, the charter of their government.

Consequently, national labor policy strongly favors the arbitration of labor disputes. *See, e.g.,* 29 U.S.C. § 173(d).[12] There is a strong presumption that all disputes arising over the application or interpretation of a collective bargaining agreement are arbitrable. *United Steelworkers v. Warrior & Gulf*

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[12] 29 U.S.C. § 173(d) provides in part:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement . . .

Navigation Co., supra, 363 U.S. at 582-83.[13] The presumption of arbitrability even applies to suits for injunctions in aid of arbitration. *Gateway Coal Co., supra,* 414 U.S. at 377-78. Indeed, the obvious rationale for granting such injunctions is to force the parties to arbitrate. *Boys Market, supra.*

Arbitration is, however, favored because, and only because, it is the method of dispute resolution to which the parties have mutually consented through collective bargaining. It would be contrary to the concept of self-government to force the parties to resolve their disputes by a method to which they had not agreed. Consequently, any duty to arbitrate is purely contractual. A party cannot be compelled to arbitrate any grievance in the absence of a contractual obligation to do so. *Nolde Brothers, Inc. v. Local 358, Bakery & Confectionery Workers,* 430 U.S. 243, 250 (1977). There is no statutory duty to arbitrate. *Gateway Coal Co., supra,* 414 U.S. at 374.

Indeed, arbitration is a creature of contract with no life independent of its collective bargaining agreement. *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* 363 U.s. at 582. It has meaning only within the contractual relationship arising from the agreement. *Nolde Brothers, supra,* 430 U.S. at 250.[14] Once the contractual relationship expires, the parties'

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[13] "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptibe of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* 363 U.S. at 582-583.

Furthermore, arbitrator's decisions are subject to very limited judicial review. *United Steelworker v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

[14] Consequently, an arbitrator's decision must "draw its essence" from the contract. *United Steelworkers v. Enterprise & Wheel Car Corp., supra.*

duty to arbitrate the meaning of that relationship also expires. *N.L.R.B. v. Haberman Construction Co.*, 618 F.2d 288, 302 n.16 (5th Cir. 1980) (dictum), *rev'd on other grounds*, 641 F.2d 351 (5th Cir. 1981) (en banc).

The union's agreement that the arbitration clause continues in effect by operation of law after the expiration of the agreement would effectively force the parties to resolve their disputes by arbitration for a longer period than that to which they had agreed. The union's position is thus contrary to existing national labor law and policy. In addition, the arbitrator would no longer be determining the parties' rights under the agreement because it would have expired. The arbitrator would have to determine the parties' rights under the NLRA, a function he is not competent to perform.

Furthermore, the union's argument is contrary to the very rationale of the injunction in aid of arbitration which it seeks. The union argues that although the arbitration clause continues in effect after the expiration of the agreement, the no strike clause does not.[15] The union thus argues that on October 9th it could have gone out on strike over its grievance but that because it chose not to strike, National Marine is bound by the arbitration clause to arbitrate. The union argues in effect that it is not bound by the arbitration clause to submit its grievances to arbitration and that, if it should choose to strike, this court could not enjoin the strike and compel it to arbitrate. The union seeks to have its cake and eat it too. It cannot.

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[15] Unlicensed Agreement, article V, section 1 and Licensed Agreement, article V, section 1 provide:

> There shall be no strike, lockout, or stoppage of work while the provisions of this Agreement are in effect, except as otherwise provided in this Agreement.

The rationale for issuing injunctions in aid of arbitration is that in order to make arbitration an effective system of industrial self-governance, each party must be able to compel the other to honor the arbitration clause. In *Boys Market, supra,* the Supreme Court reasoned that an employer must be able to enjoin a union from striking over an arbitrable grievance and in violation of a no strike clause, otherwise, no employer would agree to be bound by an arbitration clause. The Supreme Court noted that a no strike clause is generally considered the *quid pro quo* for the employer's acceptance of an arbitration clause. *Id.*, 398 U.S. at 248; *Cf. Teamsters Local 174 v. Lucas Floor Co.*, 369 U.S. 95 (1962). When courts extended the rationale of *Boys Market, supra,* to the issuance of injunctions against employers, their rationale was also to enforce the *quid pro quo. See, e.g., Lever Brothers Co. v. Int'l Chemical Workers Local 217, supra.*

There is no question that after the expiration of the agreement on October 8th, the union could have gone out on strike over its grievances. See *Kaufman & Broad Home Systems, Inc. v. Int'l Brotherhood of Firemen,* 607 F.2d 1104 (5th Cir. 1979). Therefore, after the expiration of the agreement, National Marine was not bound to arbitrate the grievances.

Accordingly, I conclude that the arbitration clause of the agreement did not continue in effect by operation of law after the expiration of the agreement.

D. *Nolde Brothers* and its Progeny

The union's second argument relies on the Supreme Court decision in *Nolde Brothers, supra,* and decisions of other courts and the NLRB[16] which purport to follow it.

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[16] The decisions of the NLRB are persuasive authority which this court must consider. *Carpenters Local Union No. 1846 v. Pratt-Farnsworth,* 690 F.2d 489 (5th Cir. 1982).

In *Nolde Brothers,* after the collective bargaining agreement expired and the employer closed its plant and the union members were laid off, the union made a demand for severance pay for its members pursuant to the wage provisions of the agreement. The union also demanded that the employer submit the question of severance pay to arbitration pursuant to a broad arbitration clause in the expired agreement.[17] The Supreme Court held that the employer was obligated to arbitrate the severance pay dispute under the expired agreement.

The decision in *Nolde Brothers* is simple and more a matter of common sense than legal reasoning. The union's grievance was arbitrable under the agreement because it involved the determination of the right to severance pay, a right arising from the agreement itself. The right to severance pay, unlike most rights under an agreement, does not expire with the agreement. In fact, it was the expiration of the agreement and the lay off of the employees that triggered the right to severance pay. Nevertheless, that right accrued under the agreement.[18] The most obvious examples of other rights that accrue under the agreement for which the parties have a post-expiration obligation to arbitrate are those rights actually in arbitration at the time of the expiration of the agreement. 430 U.S. at 251.

Despite its simple and narrow decision, *Nolde Brothers* has created a great deal of confusion over the scope of the obligation to arbitrate disputes arising from the parties' relations after the expiration of their agreement. See Geslewitz, *Case Law Development Since Nolde Brothers: When Must Post-Contract*

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[17] The arbitration clause simply applied to "all grievances". 430 U.S. at 245 n.1.

[18] The Fourth Circuit opinion is instructive on this point. *Local No. 358, Bakery & Confectionery Workers Union v. Nolde Brothers, Inc.,* 530 F.2d 548 (4th Cir. 1975).

Disputes Be Arbitrated?, 35 Labor L. J. 225 (1984). Some courts and the NLRB have read *Nolde Brothers* broadly to hold that there is a strong presumption that the parties intended their obligation to arbitrate to survive beyond the expiration of the agreement and that therefore there is a strong presumption that all post-expiration disputes arguably touching on the agreement are still subject to arbitration. *See, e.g., Local Joint Executive Board of Las Vegas, Culinary Workers Union v. Royal Center, Inc.,* 754 F.2d 835 (9th Cir. 1985); *Federated Metals Corp. v. United Steelworkers,* 648 F.2d 856 (3rd Cir. 1981); *Natsnax, Inc. v. Bakery Drivers Local 194,* No. 84-1317, slip op. (D.N.J. April 1, 1985); *Digmor Equipment & Engineering Co. Inc.,* 261 NLRB 1175 (1982); *American Sink Top & Cabinet Co., Inc.,* 242 NLRB 408 (1979).

To the extent these decisions compel, under a broad arbitration clause like that in *Nolde Brothers,* arbitration of disputes over contractual rights which accrued or vested during the agreement, they follow *Nolde Brothers.* To the extent these decisions compel, under a broad arbitration clause, arbitration of disputes over rights which are not contractual and which did not accrue or vest during the contract, I find their reasoning unpersuasive and choose not to follow them.

The only relevant authority in this circuit on *Nolde Brothers* is inconclusive. In *Boilermakers Local 582 v. Delta Southern Co.,* 602 F.Supp. 625 (M.D. La. 1985), *aff'd,* No. 85-3458 slip op. (5th Cir. January 24, 1986), the district court, relying on *Nolde Brothers,* held that a union's grievance brought after the expiration of its contract was arbitrable because it involved the determination of whether the employers' alleged payment of severance pay only to nonunion employees violated the antiduscrimination clause of the contract.[19] Because the court did

[19] The contract made no provision for severance pay so union members were only entitled to it if and when it was paid to nonunion employees.

not address when the discrimination allegedly occurred, its reading of *Nolde Brothers* is unclear.[20] The Fifth Circuit affirmed in an unpublished opinion, simply stating that it was in essential agreement with the district court.

I, therefore, approach the interpretation of *Nolde Brothers* as a question of first impression in this circuit. As I have explained, I read the decision narrowly. Accordingly, I reject the union's second argument. The arbitration clause at issue in this case only requires arbitration of the parties' contractual rights under the terms of the agreement and the parties' relations during the life of the contract. It does not require the parties to arbitrate their rights and relations which arise outside the contract and after its expiration.

IV. CONCLUSION

The SIU's grievances do not involve contractual rights under the collective bargaining agreement but rather they involve statutory rights under the NLRA. Even though it lodged its grievances during the life of the agreement, the grievances do not involve the parties' rights or relations under the agreement. As previously stated the grievances cannot make a claim that they dispute any contractual right because they challenge conduct by National Marine which occurred after the expiration of the contract. The grievances dispute whether National Marine's conduct in selling the tugs and laying off union members after the expiration of the agreement constituted an unfair labor practice by affecting a unilateral change in the terms and conditions of employment without bargaining to impasse. The pro-

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[20] For example, if the union alleged that the employer paid the nonunion employees severance pay during the life of the contract, then the grievances were over contractual rights which clearly accrued during the contract and the district court's decision is consistent with *Nolde Brothers*. This is, of course, not the only way that the district court's decision can be consistent with *Nolde Brothers*.

per forum for the union to vindicate this statutory right is the NLRB. This court has no jurisdiction to grant the relief it seeks. Accordingly,

IT IS ORDERED that the plaintiff's request for preliminary injunction is DENIED.

IT IS FURTHER ORDERED that the complaint is DISMISSED.

New Orleans, Louisiana, this 18th day of July, 1986.

/s/ MOREY L. SEAR
United States District Judge

APPENDIX C

Statutes Involved

29 U.S.C. § 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formulation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an un-

fair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to

prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the courtse of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of

his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to

refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the proceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within

a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise to an unfair labor practice under this subsection.

§ 185. Suits by and against labor organizations

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(2)

Supreme Court, U.S.
FILED
OCT 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-488

In the Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL MARINE SERVICES, INC., ET AL.,
Petitioner

VERSUS

SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District, AFL-CIO (herein, "the SIU"), submits this brief in opposition to the request of Petitioner, National Marine Services, Inc. (herein, "National Marine" or "the Company"), that a Writ of Certiorari issue to review the mandate and opinion of the United States Court of Appeals for the Fifth Circuit. The court below correctly applied the extant precedents of this court in concluding that National Marine was obligated to arbitrate the SIU's grievances after expiration of the collective bargaining agreement and the SIU's grievances are arbitrable.

COUNTERSTATEMENT OF THE CASE

A. Statement Of Material Facts

Since 1961, the SIU has represented two bargaining units of employees employed by National Marine: unlicensed personnel, which include vessel crew personnel and shore based tankermen "employed on tugboats,

towboats...and/or barges owned or operated by the Company," and licensed personnel, which include captains and engineers. Although there were separate collective bargaining agreements for each unit, many of the terms of each were identical.

Each agreement contained the same broad arbitration clause. The clause states, in pertinent part:

> All complaints, disputes or grievances arising between the parties hereto relating to or in connection with or involving questions of interpretation or application of any clause of this Agreement, or any acts or conduct or relations between the parties directly or indirectly, shall be processed pursuant to this Article.

The agreements also contained provisions which prohibited the Company from subcontracting work.

By letter dated September 26, 1985, National Marine informed the SIU that it had entered into an agreement to sell 14 of its 18 towboats to Compass Marine, Inc. (herein, "Compass"). At the same time, National Marine and Compass also entered into a towage contract whereby Compass agreed to dedicate the 14 towboats to move exclusively National Marine's barges for a five-year period.

By written grievance dated September 27, 1985, the SIU alleged that the proposed sale was a sham and, with the towage agreement, in derogation of the subcontracting clauses of the agreements, and that the unilateral layoff of tankerman from National Marine's barges (which it continued to own and operate) was in violation of the

recognition clauses of the agreements.[1] National Marine having denied the grievances, the SIU requested on October 4 that the grievances be arbitrated. National Marine refused to arbitrate.

B. Decision of The Court Below

In finding that National Marine is obligated to arbitrate the SIU's grievances although the contracts have expired, the Court of Appeals noted that the grievances were filed and arbitration was requested while the agreements were in effect; that the grievances arose under express terms of the contracts; and that the arbitration clause, which the court below commented was "as broad as any that we have seen" (Pet.App. at A-11),[2] was not negated expressly or by clear implication. Refusing to delve into the merits of the grievances as requested by National Marine, the court below further concluded that the SIU's grievances are arbitrable, in accordance with *AT&T Technologies, Inc. v. Communications Workers of America*,__ U.S. __, 106 S.Ct. 1415 (1986).

SUMMARY OF THE ARGUMENT

The Fifth Circuit Court of Appeals, following the

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[1] October 9, 1985 was established as the closing date of the sale of the vessels to Compass. Although all SIU bargaining unit personnel were laid off and replaced by Compass's employees, the sale was not consummated as scheduled. The financing for the sale had not been arranged (no bank had yet been selected) and no security was tendered, and National Marine could not produce clear title to the vessels. Yet, Compass's employees boarded the National Marine towboats in midstream on October 9, and using this same equipment, continued to push National Marine barges.

[2] References to Petitioner's Brief are abbreviated as "Pet.Br. at __." References to the Appendix to Petitioner's Brief are abbreviated as "Pet.App. at __."

guidelines previously established by this Court, correctly concluded that the parties' unusually broad arbitration clause demonstrated their agreement to arbitrate disputes after the expiration of the contract. The court below in particular relied upon this Court's precedents which establish that where the parties have agreed to a broad arbitration clause, it is to be strongly presumed that they have also agreed to arbitrate the same issues after the expiration date of the contract.

No conflict exists between the courts of appeals which warrants the issuance of a writ of certiorari. The SIU's grievances are arbitrable under the various standards established by the courts of the appeals, including that set forth by the Eighth Circuit. Any divergence between the appeals courts is, accordingly, of no moment to the resolution of the instant matter.

Having first concluded the Company was obligated to arbitrate disputes after contract expiration, the court below properly determined that the SIU's grievances are arbitrable, in accordance with the longstanding precedents of this Court. Rather than resolving the grievances on their merits, as urged by National Marine, the appeals court appropriately left it to the arbitrator.

REASONS FOR DENYING THE WRIT

A. THE ISSUE WHETHER AN EMPLOYER IS OBLIGATED TO ARBITRATE GRIEVANCES AFTER CONTRACT EXPIRATION WAS SETTLED BY THIS COURT; THE DECISION BELOW IS SQUARELY IN ACCORD WITH APPLICABLE TENETS.

Grievances grounded on the provisions of a collective

bargaining agreement which contains an arbitration clause are arbitrable after the expiration of the agreement if they are filed within a reasonable time after contract expiration, unless the presumptions favoring arbitrability have been negated expressly or by clear implication. *Nolde Bros. Inc. v. Local 358, Bakery Workers Union*, 430 U.S. 243, 255 & n.8 (1977). The strong presumption of postexpiration arbitrability grows out of the "well-established federal labor policy favoring arbitration as the means of resolving disputes over the meaning and effect of collective-bargaining agreements." *id.*, 430 U.S. at 254. Consequently, the focus of judicial contemplation of the parties' intention to arbitrate disputes after contract arbitration must be on the scope of the arbitration clause; the broader the range of arbitrable issues, the greater the presumption of an agreement to arbitrate disputes after the expiration of the contract. *id.*, 430 U.S. at 251-252, relying upon *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 553 (1964). *See Piano Workers v. W.W. Kimball Co.*, 379 U.S. 357 (1964), *rev'g* 333 F.2d 761 (7th Cir.) (summarily reversing on the basis of *John Wiley & Sons* the lower court's opinion that a postcontract dispute which arose after the expiration of the agreement was not arbitrable).

Here, the grievances were filed during the life of the agreements, not after they expired, and the demand to arbitrate was likewise made during the life of the agreement. The grievances were based on actions taken by National Marine during the life of the agreement: the simultaneous entering into of a sale agreement and exclusive towage agreement with Compass. It was these events which triggered the grievances, contrary to National Marine's assertions. Since these matters arose under the contract, the expiration of the contracts does not terminate the Company's obligation to arbitrate. *Nolde Bros.*, 430 U.S. at 251; *John Wiley & Sons, Inc.*, 376 U.S. at 543 (holding severance pay dispute arising after expiration of the contract was

arbitrable, where plant had shut down, and grievances were filed and arbitration demanded prior to shutdown.).

Indeed, in *Nolde Bros.* this Court rejected the contention "that termination of a collective bargaining agreement automatically extinguishes a party's duty to arbitrate grievances arising under the contract. Carried to its logical conclusion that argument would preclude the entry of a post-contract arbitration order even when the dispute arose during the life of the contract but arbitration proceedings had not begun before termination." 430 U.S. at 251.

National Marine contends that *Nolde Bros.* stands for the proposition that only rights which "accrue" during the term of a contract--such as severance pay--are arbitrable after expiration of the contract. (Pet.Br. at 8.) But the "accrued" rights standard was, as the Fifth Circuit stated, squarely before this Court in *Nolde Bros.* because it was the foundation of the decision of the Fourth Circuit Court of Appeals in *Local 358, Bakery & Confectionary Workers Union v. Nolde Bros., Inc.*, 530 F.2d 548 (4th Cir. 1975). Chief Justice Burger's opinion, although affirming the mandate of the Fourth Circuit, rejected the narrow holding and drew no distinction between so-called accrued rights and rights which arise under the terms of a contract. *See Local Jt. Exec. Bd. v. Royal Center, Inc.*, 796 F.2d 1159 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 881 (1987); *Federated Metals Corp. v. United Steelworkers*, 648 F.2d 856, 861 (3d Cir.), *cert. denied*, 454 U.S. 1031 (1981) (rejecting contention that only rights accruing under contract prior to termination are arbitrable).

That there was an agreement to arbitrate disputes arising under the contract after its expiration is plain from the exceptionally broad arbitration clause, and the court below so found. In addition to matters of contract

interpretation, the parties agreed to arbitrate "*any acts, conduct or relations between the parties, directly or indirectly,*" establishing an exceptionally broad range of arbitrable issues. "The parties' failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationships." *Nolde Bros.*, 430 U.S. at 1074. The Fifth Circuit properly found this far-reaching arbitration clause demonstrated the parties' desire to arbitrate virtually any issue between the parties, even after the contract expired.

National Marine fails to address the exceptional breadth of the arbitration clause. National Marine instead advances its interpretation of the contract clauses implicated by the SIU's grievances, asserting that the Fifth Circuit should have weighed the merits of the SIU's grievances to determine whether National Marine is obligated to arbitrate the disputes after contract expiration. In *Nolde Bros.*, 430 U.S. at 252-53, and most recently in *AT&T Technologies*, 106 S.Ct. at 1419, however, this Court has reaffirmed that the judiciary is not to rule on the potential merits of the underlying grievances, for the parties have bargained for an arbitrator to perform this function. The court below correctly refused to place itself in the arbitrator's stead and examine the merits of the grievances.

Nor, as National Marine contends, must the decision of the Fifth Circuit be reversed because it conflicts with the "general principles of contract law" (Pet.Br. at 16.) A collective bargaining agreement is not an ordinary contract and the general principles of law governing an ordinary contract do not necessarily apply to labor contracts. *John Wiley & Sons*, 376 U.S. at 550 (compelling an

"unconsenting successor to a contracting party" to arbitrate a dispute arising after the expiration of the agreement.)

Three times this Court has held that an employer is obligated to arbitrate grievances which arise after the expiration of an agreement. The court of appeals' decision is in conformity with this precedent.

B. THERE IS NO INTER-CIRCUIT CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEALS WHICH WARRANTS REVIEW BY THIS COURT

National Marine contends that the decision below is in conflict with the decision of the Eighth Circuit Court of Appeals in *Teamsters Local 238 v. C.R.S.T., Inc.*, 795 F.2d 1400 (8th Cir.) *(en banc)*, *cert. denied*, 107 S.Ct. 647 (1986). There, the Eighth Circuit Court of Appeals stated that "for a right to arbitration to exist the grievance must either involve rights which to some degree have vested or accrued during the life of the contract and merely ripened after termination, *or relate to events which have occurred at least in part while the agreement was still in effect.*" (emphasis added.) *id.*, 795 F.2d at 1403.[3] Plainly, the Eighth Circuit did not, contrary to National Marine's intimations, limit postcontract arbitrability to only "accrued" rights.

As the court below stated, the SIU's grievances arose out of actions taken by National Marine during the life of the agreement, and were lodged, as was the demand

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[3] The rule for arbitrability enunciated by the Fifth Circuit is virtually identical to the rule set forth by this Court in *Nolde Bros.*, 430 U.S. at 251-52, 258: "disputes grounded on a collective bargaining agreement containing an arbitration clause are arbitrable even after expiration of the agreement unless the arbitration clause states otherwise." (Pet.App. at A-11.)

for arbitration, prior to the expiration of the agreement. (Pet.App. A-10.) Thus, the SIU's grievances are arbitrable under both the Fifth Circuit's and the Eighth Circuit's holdings. Both have rejected National Marine's position that only accrued rights are arbitrable following the contract's expiration. To the extent they may be at variance, certiorari is not warranted since the result is the same under either court's interpretation of *Nolde Bros.* Rather than being in conflict, these circuit courts of appeals are in substantial accord.[4]

C. AS INSTRUCTED BY THIS COURT'S PRECEDENTS, THE FIFTH CIRCUIT COURT OF APPEALS REFUSED TO RULE ON THE MERITS OF THE SIU'S GRIEVANCES

In *AT&T Technologies*, this Court reaffirmed that the inquiries and principles set forth in the *Steelworkers Trilogy*[5] are to be utilized to determine whether an employer is required to arbitrate a grievance. Briefly stated, the judiciary:

(1) is to determine whether an employer has agreed to submit a dispute to arbitration;

(2) is to determine whether the collective bargaining agreement creates a duty to arbitrate the particular grievances;

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[4] For these reasons, the decision of the Fifth Circuit is in harmony with the decision of the National Labor Relations Board (herein, "the NLRB") in *Indiana & Michigan Electric Co.*, 284 N.L.R.B. No. 7 (May 29, 1987), *petition for review pending*, Dkt. No. 87-1247 (D.C. Cir.).

[5] The *Steelworkers Trilogy* is: *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

(3) is not to rule on the potential merits of the grievance; and

(4) is to order arbitration where a contract contains an arbitration clause, because arbitrability is presumed unless it may be said with "positive assurance" that the arbitration clause is not susceptible of an interpretation which covers the grievances.

106 S.Ct. at 1418-1419.

The Fifth Circuit applied each of the foregoing principles to determine whether the SIU's grievances were arbitrable, after having concluded the Company's obligation to arbitrate disputes continued past the contract's expiration date.[6] The court found the arbitration clause to be "as broad as any we have seen;" it covers virtually any type of dispute between the parties.

It also appropriately refused National Marine's request to delve into the merits of the grievance in determining "substantive" arbitrability. For it is axiomatic that "'[t]he courts...have no business weighing the merits of the grievance, considering whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *AT&T Technologies*, 106 S.Ct. at 1419, quoting *American Mfg. Co.*, 363 U.S. at 568.

That the SIU filed unfair labor practice charges with the New Orleans Regional Office of the NLRB which were

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[6] While National Marine challenges the Fifth Circuit's two-step approach (i.e., whether the Company was obligated to bargain after contract expiration and if so, whether the grievances were arbitrable), it was essentially the approach suggested by this Court in *Nolde Bros.*

subsequently withdrawn does not in any respect preclude the arbitration of the SIU's grievances. Issues raised before the NLRB may be concurrently arbitrated. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976); *Smith v. Evening News Ass'n*, 371 U.S. 195, 197-98(1962).

CONCLUSION

In summary, the decision of the court below was in full accord with the decisions of this Court, and of the courts of appeals. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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